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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

On Appeal From the Court of Appeals of the State of New York.

BRIEF OF MOBIL CORPORATION AS AMICUS CURIAE.

EDWIN P. ROME,
WILLIAM H. ROBERTS,
1100 Four Penn Center Plaza,
Philadelphia, Pennsylvania. 19103
Attorneys for Mobil Corporation as Amicus Curiae.

Of Counsel:
BLANK, ROME, COMISKY & MCCAULEY,
1100 Four Penn Center Plaza,
Philadelphia, Pennsylvania. 19103

F. W. D. SCHAEFER,
Mobil Corporation,
150 East 42nd Street,
New York, New York. 10017

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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BRIEF OF MOBIL CORPORATION AS AMICUS CURIAE.

Mobil Corporation ("Mobil") respectfully submits this brief as *amicus curiae* [1] urging the Court to reverse the decision of the Court of Appeals of New York, because that decision and the decision of this Court on the important questions involved may affect its ability to participate in free and open expression concerning public issues.

1. Pursuant to Rule 42(2), there have been lodged with the Clerk the written consents of counsel for Consolidated Edison Company of New York, Inc., appellant, and of counsel for the Public Service Commission of the State of New York, appellee, to the filing of this Brief *Amicus Curiae*.

THE INTEREST OF MOBIL CORPORATION.

This case concerns direct interference by the State of New York with First Amendment-protected speech in the form of written communications by a private corporation on important, controversial issues of public policy. The sweeping, governmental ban on speech concerning matters of governing importance at issue in this case constitutes a frontal assault on the core of the First Amendment. The issues involve not only the right of expression but the right of citizens to have unfettered access to informed viewpoints on public policy issues currently the subject of intensive debate.

Unconstitutional restrictions on written communications by regulated, privately-owned public utilities similar to the New York regulation involved in this case have been put into effect or are being considered in several states other than New York.[2]

2. Bill insert bans are prohibited in California (Cal. Pub. Util. Code § 453(d)) and have been or are being considered by public regulatory agencies in Pennsylvania, Iowa, Maine and North Carolina. *Expenditures by Utilities for Advertising*, 76 PRMD-6, Pa. Bulletin, Vol. 6, No. 38, September 4, 1976, at 2218 (Pennsylvania P. U. C.); *Citizens United for Responsible Energy v. Iowa Paper and Light Co.*, Docket No. C-5-185 (Iowa State Commerce Commission, orders dated October 10 and 31, 1975); *In Re Petition of Committee for Cheaper Electrical Rates*, F. C. #2026 (Maine P. U. C. October 16, 1973); *In Re Investigation and Rulemaking Relating To What May Be Included As a Utility Bill Insert*, Docket No. M-100, Sub 80 (November 10, 1978).

In addition to imposing a flat prohibition on written communications with customers by the inexpensive and effective means of bill inserts, many state public utility commissions are now extensively engaged in subtle and arbitrary forms of censorship of private, investor-owned public utilities through the mechanism of regulations classifying types of speech and disallowing expenditures made for such speech for ratemaking purposes. See, McMahon, *"State Regulation of Advertising by Investor-Owned Electric Utilities: The Development of Current Standards and Their Constitutional Limits"*, 12 IND. L. REV. 603 (1979); NOTE, *"Advertising by Public Utilities As An Allowable Expense For Ratemaking:*

Mobil is a Delaware corporation which is principally engaged in business in the United States and international energy industries. Its wholly owned subsidiary, Mobil Oil Corporation ("Mobil Oil"), conducts an integrated international energy business including the exploration, production, transportation, refining and marketing of petroleum, petrochemicals, natural gas and products thereof. The petroleum industry in the United States is currently subject to extensive governmental regulation including price and allocation controls on crude oil and certain refinery products. In 1978, Congress enacted the Natural Gas Policy Act, 15 U. S. C. §§ 3301-3432 and 42 U. S. C. § 7255, which placed price controls on intrastate sales of natural gas that had theretofore been exempt from such control. In addition, under the authority of the Emergency Petroleum Allocation Act of 1973, 15 U. S. C. §§ 751 *et seq.*, and the Economic Stabilization Act of 1970, as amended, 15 U. S. C. § 1026, the Department of Energy and its predecessors have promulgated regulations which place pricing restrictions on refiners of petroleum products, 12 C. F. R., Part 212, Subpart E. Mobil is also subject to regulations issued by the Wage and Price Council under the Act Establishing the Council on Wage and Price Stability, Pub. L. 93-37 and Executive Order 12092, Novem-

2. (Cont'd.)

Assault on Management Prerogative", 13 VALPARAISO L. REV. 87 (1978); NOTE, *"Utility Companies and the First Amendment: Regulating the Use of Political Inserts in Utility Bills*, 64 VA. L. REV. 921 (1978). Compounding these developments, Congress in 1978 enacted the Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, §§ 101-43, 92 Stat. 3117 (1978) (to be codified in 16 U. S. C. §§ 2611-44 and 42 U. S. C. §§ 6801-08), which contains provisions requiring state regulatory agencies to exclude the costs of political and promotional advertising from utility rates unless the agencies find that such exclusion would not tend to further the purpose of the Act or would not be consistent with applicable state law.

ber 1, 1978, as amended by Executive Order 12161, October 2, 1979. In addition, several states, including New Mexico, Kansas and Texas,[3] treat operators of intrastate pipelines for intrastate shipment of petroleum as public utilities subject to state regulation.

Mobil has a continuing interest in communicating with its customers, as well as its shareholders, employees and suppliers, concerning important public policy issues, including the wisdom of aspects of federal and state regulation and proposed legislation, which might be deemed to be "controversial" by state and federal regulatory officials charged with the administration of the extensive regulatory schemes currently in place. Because of the importance to Mobil of the on-going, politically-charged debate on energy policy issues and other important economic questions, Mobil has a duty to its stockholders to maintain, and has a vital interest in maintaining, its right to participate in free and open public debate of these issues and to reply to inaccurate and misleading viewpoints in the most effective means available to it, uninhibited by government censorship.

The current threat—illustrated by the action of the Public Service Commission of New York and the decision of the New York Court of Appeals in this case—of flat prohibition of written communication with customers through bill inserts by private corporations subject to state and federal regulation represents a direct effort to stifle public debate on important public issues. In addition to depriving the public of a free flow of important information and balanced opinion on public affairs, it threatens vital interests of Mobil.

The preservation of the unfettered right to communicate by means of conventional means such as the

3. N. M. S. A. 70-3-1 *et seq.*; Texas Nat. Res. Code §§ 111.181, 111.183; Kan. Stat. § 55-501.

United States mails on controversial matters of public policy assumes special importance to the business community in view of the refusal of major television networks to accept paid advertisements by corporations on important questions of public policy, including advertisements seeking to *correct misstatements* in radio and television network news coverage and commentary. The television networks have persisted in their arbitrary refusal to accept such advertising even though Mobil has offered to purchase equal time for responses to its messages. Mr. Chief Justice Burger's observation in *First National Bank of Boston v. Bellotti*, 435 U. S. 765, 796 (1978), that "it could be argued that such media conglomerates . . . pose a much more realistic threat to valid interests than do appellants [the First National Bank of Boston *et al.*] and similar entities not regularly concerned with shaping popular opinion on public issues" has, in fact, been borne out by the effective and arbitrary foreclosure of the major electronic media to communications by the business community on public policy questions. *See e.g.*, "The Impossible Freedom", Mobil advertisement in "The New York Times", November 8, 1979 (television network denial of access to advocacy advertising); "19 Dull and Unsensational Facts About Our Profits the TV Networks Didn't Tell You—and Won't Allow Us to Tell You," Mobil advertisement in "The New York Times," November 5, 1979, at B4; "How CBS on October 24, 1979 Prefabricated the News," Mobil advertisement in "The New York Times," November 5, 1979, at B5; "Chilling the Debate," Mobil advertisement in "The New York Times," May 31, 1979; "Thank You, Walter Cronkite," Mobil advertisement in "The New York Times," January 20, 1977; "What Ever Happened to Fair Play," Mobil advertisement in "The New York Times," March 5, 1976; "Freedom Is Everybody's Right," Mobil advertisement in "The New York Times,"

March 5, 1976; "Why Do Two Networks Refuse To Run This Commercial?" Mobil advertisement in "The New York Times," July 17, 1974; "Can a Corporation Speak Its Mind in Public?" Kaiser Aluminum & Chemical Corporation advertisement in "The New York Times," June 19, 1979 (concerning refusal of three major networks to accept Kaiser advertisements on public policy issues).

In the absence of a definitive ruling invalidating the New York regulation in this case, federal and state regulatory agencies which currently have less restrictive policies may enact similar prohibitory regulations which would disadvantage Mobil and would prevent full public consideration of important public policy questions.

SUMMARY OF THE ARGUMENT.

1. Expression on public issues lies at the core of the First Amendment's protection, and the mails are a conventional and favored Federal instrumentality for the dissemination of such expression over which the States possess no power of censorship.

2. Expression on public issues is entitled to no less protection merely because the source of such expression is a corporation.

3. The New York Public Service Commission's ban on utility inserts addressing controversial matters of public policy is an impermissible prior restraint upon the dissemination of expression on public issues through the mails.

4. The State has no legitimate interest, much less a "compelling" interest, in restraining speech on public issues. The state may not constitutionally censor the mail and deprive willing prospective recipients of protected speech on the entirely hypothetical ground that some prospective speech by investor-owned utilities might be "offensive" to some recipient.

5. The Public Service Commission's Order banning communication with respect to a class of "controversial" issues is not content-neutral and cannot be sustained on the ground that other means for disseminating such expression, which are prohibitively more expensive and less effective, are not foreclosed by Order of the State.

6. The Public Service Commission's Order banning bill inserts concerning "controversial matters of public policy" rests on a subjective distinction between "controversial" and noncontroversial viewpoints which is inherently incapable of precise delineation. The Order subjects protected speech to the standardless discretion of

State officials, impermissibly chills the exercise of the freedom of expression, and interferes with the operation of vital democratic processes by crippling debate on public issues.

ARGUMENT.

I. New York's Flat Prohibition of Written Communications by Private Utilities With Their Customers Through Bill Inserts Concerning "Controversial Matters of Public Policy" Denies the Freedom of Speech and of the Press Guaranteed by the First Amendment.

This case is a constitutional challenge, brought by a New York public utility under the First and Fourteenth Amendments to the United States Constitution, to the validity of an Order ("the Order") of the Public Service Commission of the State of New York ("Commission"), dated February 25, 1977, a classic, impermissible restraint flatly banning the use of bill inserts by public utilities as a means of communicating with public utility customers on "controversial matters of public policy." The February 25, 1977 Commission Order provides, in relevant part:

> "All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of *the utility's position on controversial matters of public policy.*" (Emphasis added)

This Order is directly focused on written communications "on controversial matters of public policy," and strikes at the very heart of protected expression. It is respectfully submitted, for the reasons which follow, that wholesale abolition of First Amendment rights by this blanket prohibition of written communications on matters of governing importance is inconsistent with the First and Fourteenth Amendments to the Constitution.

A. Private Written Communications by Mail Concerning "Controversial Matters of Public Policy" Enjoy the Most Extensive Protection of the First Amendment From Government Censorship.

The Order challenged in this case, barring communication on "controversial matters of public policy" by means of bill inserts sent through the mails, draws into play the most stringent standards of constitutional scrutiny.

In singling out for special regulation speech concerning "public policy" which may be deemed to be "controversial," the Order isolates that speech which lies at the very core of the protection guaranteed by the First Amendment. As the Court has many times reiterated, that Constitutional safeguard was founded on "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times v. Sullivan,* 376 U. S. 254, 270-271 (1964). "For speech concerning public affairs is more than self-expression, it is the essence of self-government." *Garrison v. Louisiana,* 379 U. S. 64, 74-75 (1964). As the Court has said, "[T]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our Constitutional system." *Stromberg v. California,* 283 U. S. 359, 399 (1931).

In *Thornhill v. Alabama,* 310 U. S. 88 (1940), the Court broadly restated the central position of speech on questions of public policy:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of a subsequent punishment . . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with exigencies of their period." 310 U. S. at 101-102.

The First Amendment "embodies our Nation's commitment to popular self-government and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason, this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression. *Kleindienst v. Mandel,* 408 U.S. 753, 762 (1972); *Red Lion Broadcasting Co. v. F. C. C.,* 395 U. S. 367, 390 (1969); *Lamont v. Postmaster General,* 381 U. S. 301 (1965); *Martin v. City of Struthers,* 319 U. S. 141, 143 (1943)." *Saxbe v. Washington Post Co.,* 417 U. S. 843, 862-863 (1974) (Dissenting opinion of Mr. Justice Powell, joined by Mr. Justice Brennan and Mr. Justice Marshall). What is at stake here is "the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny." Id. at 862.

In *Buckley v. Valeo,* 424 U. S. 1 (1976), the Court once again reaffirmed the primacy of speech on public affairs: "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the]

unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth v. United States*, 354 U. S. 476, 484 (1957). Although First Amendment protections are not confined to 'the exposition of ideas,' *Winters v. New York*, 333 U. S. 507, 510 (1948), 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . .' *Mills v. Alabama*, 384 U. S. 214, 218 (1966)." 424 U. S. at 14.

In *First National Bank of Boston v. Bellotti*, 435 U. S. 765 (1978), the Court invalidated a Massachusetts criminal statute prohibiting banks and business corporations from making expenditures for the purpose of influencing the vote on referendum proposals which imposed an indirect inhibition on expression addressed to public policy questions. In that case, the bank's speech on the public policy question involved in the referendum—a constitutional amendment permitting the legislature to impose a graduated tax on the income of individuals—"[fell] squarely" within the "heart of the First Amendment's protection." 435 U. S. at 776.

In *Friedman v. Rogers*, Nos. 77-1163, 1164 (Opinion filed February 21, 1979) at n. 10, the Court reiterated that "free discussion of governmental affairs 'is at the heart of the First Amendment's protection.' "

The rationale of the protection afforded by the First Amendment to speech on public affairs has been aptly stated by Professor Meiklejohn in these terms:

> "Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government." A. Meiklejohn, Free Speech 26 (1948) (emphasis in original).

This case, then, involves speech of the type that, under the decisions of this Court, has been afforded the most extensive protection of the First Amendment. It does not involve expression such as speech which does "no more than propose a commercial transaction,"[4] or expression which is "on the borderline between pornography and artistic expression"[5] which opinions of members of the Court have intimated may not receive the highest degree of protection under the First Amendment. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U. S. 85, 98 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U. S. 748, 771-772 n. 24; *Young v. American Mini Theatres*, 427 U. S. 50, 61 (Opinion of Mr. Justice Stevens); *but see, Federal Communications Commission v. Pacifica Foundation*, 438 U. S. 726, 761-763 (concurring opinion of Mr. Justice Powell and dissenting opinion of Mr. Justice Brennan). Moreover, neither the legality of any conduct proposed nor the truthfulness of the prohibited speech is questioned.[6]

While the Court has noted that "each medium of expression presents special First Amendment problems", *Federal Communications Commission v. Pacifica Foundation*, 438 U. S. 726, 748 (1978), this case involves State

4. *Pittsburgh Press Co. v. Human Relations Commission*, 413 U. S. 376, 385 (1973).

5. *Young v. American Mini Theatres*, 427 U. S. 50, 61 (1976).

6. *Pittsburgh Press Co. v. Human Relations Commission*, 413 U. S. 376 (1973); *Bigelow v. Virginia*, 421 U. S. 809 (1975).

suppression of speech through a traditional medium of expression—private written communication through the United States mail concerning "controversial matters of public policy"—expression which has enjoyed the most expansive protection of the First Amendment. This case does not involve the practical difficulties of symbolic speech or meetings, parades, picketing, demonstrations, canvassing and other forms of expression involving elements of both speech and conduct.[7] It does not involve speech broadcast over electronic media, possessing "unique characteristics" which "make it especially subject to regulation in the public interest" and which traditionally receives "the most limited First Amendment protection."[8] It does not involve oral speech in public amplified electronically to produce sounds louder than the human voice.[9] It does not involve public display advertising.[10]

As the fundamental medium for protected expression, the mails enjoy the protection of the First Amendment from State intrusion. In *Ex Parte Jackson*, 96 U. S. 727 (1878), in which the Court stated that the mails may not be regulated in any manner so as to interfere with the freedom of the press, Mr. Justice Field wrote: "[l]iberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." The dissemination of ideas "can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."

7. *United States v. O'Brien*, 391 U. S. 367 (1968).

8. *Federal Communications Commission v. Pacifica Foundation*, 438 U. S. 726, 748 (1978); *Bates v. State Bar of Arizona*, 433 U. S. 350, 384 (1977); *Bigelow v. Virginia*, 421 U. S. 809, 825 n. 10 (1975); *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 395 U. S. 367, 386-387 (1969).

9. *Kovacs v. Cooper*, 336 U. S. 77 (1949).

10. *Lehman v. City of Shaker Heights*, 418 U. S. 298 (1974).

Lamont v. Postmaster General, supra, 381 U. S. at 308 (concurring opinion of Mr. Justice Brennan).

The mails have traditionally been the essential means for the dissemination of political thought and opinion and a favored conduit for information necessary to the full consideration of public issues. The history of the establishment of the post office shows that the framers of the Constitution were keenly alive to the vital role of the mails in democratic processes as a necessary instrumentality of government. Washington deemed the proper functioning of the mails essential to the full consideration of the Constitution itself.[11] The political fortunes and public acceptance of the early Republic depended on the mails, and in their anxiety to safeguard its life, the framers urged the prompt improvement of the postal system. In his annual messages in 1791, 1792, and 1793, Washington laid emphasis on the social and political importance of the mails:

11. On July 18, 1788, Washington wrote to John Jay concerning the organization of the post office:

> "It is extremely to be lamented that a new arrangement in the post office, unfavorable to the circulation of intelligence, should have taken place at the instant when the momentous question of a General Government was to come before the people. I have seen no good apology * * * for deviating from the old custom of permitting printers to exchange their papers by the mail. That practice was a great public convenience and gratification. If the privilege was not from convention an original right, it had from prescription strong pretensions for continuance, especially at so interesting a period. The interruptions in that mode of conveyance has not only given great concerns to the friends of the Constitution, who wished the public to be possessed of everything that might be printed on both sides of the question, but it has afforded its enemies very plausible pretexts for dealing out their scandals, and exciting jealousies by inducing a belief in the suppression of intelligence at that critical juncture was a wicked trick of policy, contrived by an aristocratic junto."
>
> as quoted in Post and Neal, *Postal Economics* 10 (1918)

Third Annual Message, 1791:

"The importance of the post office and post roads on a plan sufficiently liberal and comprehensive, as they respect the expedition, safety, and facility of communication, is increased by their instrumentality in diffusing a knowledge of the laws and proceedings of the Government, which, while it contributes to the security of the people, serves also to guard them against the effects of misrepresentation and misconception. The establishment of additional cross-posts, especially to some of the important points in the western and northern parts of the Union, can not fail to be of national utility."

Fourth Annual Message, 1792:

"It is represented that some provisions in the law which establishes the post office, operate, in experiment, against the transmission of newspapers to distant parts of the country. Should this upon due inquiry be found to be the fact, a full conviction of the importance of facilitating the circulation of political intelligence and information will, I doubt not, lead to the application of a remedy."

Fifth Annual Message, 1793:

"But here I can forbear to recommend a repeal of the tax on the transportation of public prints. There is no resource so firm for the Government of the United States as the affections of the people, guided by an enlightened policy, and to this primary good nothing can conduce more than a faithful representation of public proceedings, diffused without restraint throughout the United States."

Post and Neal, *Some Postal Economics* 11 (1918)

Mr. Justice Story, in his *Commentaries on the Constitution of the United States, Abridgment* (1833), echoed these sentiments: "The post-office establishment has already become one of the most beneficent, and useful establishments under the national government. It circulates intelligence of a commercial, political, intellectual, and private nature, with incredible speed and regularity. It thus administers, in a very high degree, to the comfort, the interests, and the necessities of persons, as it were, in contact with each other; and thus softens the anxieties, increases the enjoyments, and cheers the solitude of millions of hearts. * * * Thus, its influences have become, in a public, as well as private view, of incalculable value to the permanent interests of the Union." Ch. XVIII, § 552, 396-397.

President Jackson in his first annual message to Congress said of the Post Office: "In a political point of view this Department is chiefly important as a means of diffusing knowledge. It is to the body politic what the veins and arteries are to the natural—conveying rapidly and regularly to the remotest parts of the system correct information of the operations of the Government, and bringing back to it the wishes and feelings of the people. Through its agency we have secured to ourselves the full enjoyment of the blessings of a free press." Richardson, comp., *Messages and Papers,* II: 460-61, as quoted in Fowler, *Unmailable: Congress and the Post Office* 21 (1977). In the first debate on postal censorship in 1836, provoked by the circulation through the mails of "incendiary matter" by the American Anti-Slavery Society, Congress itself concluded that it lacked power to censor the mails. Fowler, *Unmailable: Congress and the Post Office* 21-41 (1977); Rogers, *The Postal Power of Congress: A Study in Constitutional Expansion* 97-113 (1915). In *Ex Parte Jackson, supra,* the Court recounted the extensive consideration in Congress in 1836 of Congress' power, *vel non,* to exclude

publications from the mails by reason of their content. The report of the select committee of the Senate, chaired by Senator Calhoun, designated on that occasion to examine the question, is instructive. The report concluded:

> "After the most careful and deliberate investigation, they have been constrained to adopt the conclusion that Congress has not the power to pass such a law.
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> * * * *
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> "The object of publishing is circulation, and to prohibit circulation is, in effect, to prohibit publication . . . and the prohibition of one may as effectually suppress such communication as the prohibition of the other, and, of course, would as effectually interfere with the freedom of the press, and be equally unconstitutional. . .
>
> "From these remarks, it must be apparent that to prohibit publications on one side, and circulation through the mail on the other, of any paper, on account of its religious, moral or political character, rests on the same principle, and that each is equally an abridgment of the freedom of the press, and a violation of the constitution." S. Rep. 118, 24th Cong., 1st Sess. (1836), p. 1-4, as quoted in Deutsch, *"Freedom of the Press and of the Mails,"* 36 Mich. L. Rev. 703 (1938).

As the Court has said, quoting Mr. Justice Holmes' dissenting opinion in *Milwaukee Pub. Co. v. Burleson,* 255 U. S. 407, 437 (1921), "the use of the mails is almost as much a part of free speech as the right to use our tongues." *Procunier v. Martinez,* 416 U. S. 396, 422 (1974) (concurring opinion of Mr. Justice Marshall); *Blount v. Rizzi,* 400 U. S. 410, 416 (1971); *Lamont v. Postmaster General,* 381 U. S. 301, 305 (1965). The Court has acknowledged that the postal system, established by Congress pursuant to the exclusive powers conferred by Article 1, § 8, Cl. 7 of the Constitution, is by "now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare." *Lamont v. Postmaster General, supra,* 381 U. S. at 306. In view of the unique status of the mails as a means for the dissemination of vital expression on governmental matters, "[u]se of the postal power to regulate material that is not fraudulent or obscene raises 'grave constitutional questions.'" *F. C. C. v. Pacifica Foundation,* 438 U. S. 726, 741 n. 17; *Hannegan v. Esquire, Inc.,* 327 U. S. 146, 156 (1946).

The Court has construed in expansive fashion the First Amendment's guarantee to protect the dissemination of ideas through the mails from even more subtle forms of interference and inhibition by the Federal government—much less intrusive, direct censorship of the mails such as that imposed by New York in this case. *See, Smith v. United States,* 431 U. S. 291 (1977) (First Amendment standards define "obscene" matter mailed in violation of 18 U. S. C. § 1461); *United States v. Ramsey,* 431 U. S. 606 (1977) (First Amendment considerations in application of "border search" exception to incoming international mail); *Procunier v. Martinez,* 416 U. S. 396 (1974) (First Amendment protects against unjustified interference by State prison officials with direct personal correspondence of prison inmates); *Lamont v. Postmaster General,* 381 U. S. 301 (1965) (First Amendment protects right of addressee to receive politically unpopular materials through the mails); *Manual Enterprises, Inc. v. Day,* 370 U. S. 478 (1962) (First Amendment

standards for "obscene" matter applied to review of postal exclusion order entered under 18 U. S. C. § 1461); *Roth v. United States*, 354 U. S. 476 (1957) (First Amendment standards define "obscene" matter that may be excluded from the mails under 18 U. S. C. § 1461); *Hannegan v. Esquire, Inc.*, 327 U. S. 146 (1946) (First Amendment bars selective revocation of magazine's second class mailing permit on basis of "indecent" content).

In *Hannegan v. Esquire, Inc.*, 327 U. S. 146 (1946), the Court held that the Postmaster General could not constitutionally revoke a magazine's second class mail permit and relegate the magazine to a more expensive postal classification, on the basis of the Postmaster General's determination that the magazine contained "indecent, vulgar and risque," but non-obscene, matter. In *Lamont v. Postmaster General, supra*, the Court held that Congress may not require recipients of politically unpopular but constitutionally protected material to request in writing that the material be delivered to them. The Court concluded that the required notification in writing was an "unconstitutional abridgment" of First Amendment rights because the requirement was "almost certain to have a deterrent effect." 381 U. S. at 307.

This case involves the deliberate suppression by the State of speech of high governmental importance in its most innocuous medium: private written communication through the United States mails on "controversial matters of public policy." If within the firstness of the First Amendment there is a firstness also among the interests fostered by the Freedom of Speech and of the Press Clause, then it is the interest in the free flow of politically relevant information to the public. The sweeping prior restraint at issue in this case is expressly designed to cripple communication on "public policy" issues and to interfere

with that free flow of politically relevant information to the public. No conceivable justification can support it.

B. Corporate Speech on "Controversial Matters of Public Policy" Is Protected by the First Amendment.

The speech on "controversial matters of public policy" which is suppressed by the Order at issue in this case is not without First Amendment protection simply because the source of that speech is a corporation. In *First National Bank of Boston v. Bellotti*, 435 U. S. 765 (1978), the Court held that the First Amendment "protects interests broader than those of the party seeking their vindication." 435 U. S. at 776. The Court struck down a Massachusetts statute which imposed an indirect restraint upon the expression of opinion on public issues by corporations by prohibiting expenditures by corporations for the purpose of publishing such opinion or comment. Recognizing that the speech inhibited by the Massachusetts statute involved in that case was "the type of speech indispensable to decision making in a democracy" and that the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source," the Court rejected the assertion that expression by a corporation could, consistent with the First Amendment, be limited to speech pertaining directly to the corporation's business interests. The supreme importance of the governmental interests protected by the First Amendment prohibits interference with all sources of protected speech, particularly informed speech of the type "indispensable to decision making in a democracy." "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may ad-

dress a public issue. *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 96 (1972)." *First National Bank of Boston v. Bellotti, supra*, 435 U. S. at 784-785.

The principle supporting constitutional protection for speech concerning public issues, regardless of its source, is well-established in the decisions of the Court. In *Bigelow v. Virginia*, 421 U. S. 809 (1975), the Court reversed the conviction of a newspaper editor who had violated a Virginia statute by publishing an advertisement for an abortion referral service in New York. The statute in question constituted a direct restraint upon "what Virginians may *hear* or *read* about the New York services." 421 U. S. at 827. The Court said: "The policy of the First Amendment favors dissemination of information and opinion, and '[t]he guarantees of freedom of speech and press were not designed to prevent "the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential. . . ." 2 Cooley, Constitutional Limitations 886 (8th ed.).' *Curtis Publishing Co. v. Butts*, 338 U. S. 130, 150 (1967) (opinion of Harlan, J.)." 421 U. S. at 829. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U. S. 748 (1976), the Court invalidated a state statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. While a central question in that case was whether speech which "does no more than propose a commercial transaction" enjoys the protection of the First Amendment, the Court emphasized the vital First Amendment interest in preserving the free flow of even commercial advertising (425 U. S. at 756):

> "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. In *Lamont v. Postmaster General*, 381 U. S. 301 (1965), the Court upheld the First Amendment rights of citizens to receive political publications sent from abroad. More recently, in *Kleindienst v. Mandel*, 408 U. S. 753, 762-763 (1972), we acknowledged that this Court has referred to a First Amendment right to 'receive information and ideas', and that freedom of speech 'necessarily protects the right to receive.' And in *Procunier v. Martinez*, 416 U. S. 396, 408-409 (1974), where censorship of prison inmates' mail was under examination, we thought it unnecessary to assess the First Amendment rights of the inmates themselves, for it was reasoned that such censorship equally infringed the rights of noninmates to whom the correspondence was addressed. There are numerous other expressions to the same effect in the Court's decisions. See, *e.g. Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367, 390 (1969); *Stanley v. Georgia*, 394 U. S. 557, 564 (1969); *Griswold v. Connecticut*, 381 U. S. 479, 482 (1965); *Marsh v. Alabama*, 326 U. S. 501, 505 (1946); *Thomas v. Collins*, 323 U. S. 516, 534 (1945); *Martin v. Struthers*, 319 U. S. 141, 143 (1943)."

The same principle is applicable here. The Order of the Public Service Commission acts as a direct and specific restraint on the circulation through the mails to Con Edison's customers of bill inserts addressing "controversial matters of public policy."

Not only does the Order interfere directly with the circulation of protected speech on "controversial matters of public policy"—a species of expression which lies at the core of the First Amendment—the Order interferes with

speech by a corporation to its own customers, the very class of persons which would have the most animated interest in and need for the speech which the Order bans.

The Order is in direct conflict with prior pronouncements of this Court on permissible interference by the government with communications by corporations with their customers on matters of governing importance. In *United States v. C. I. O.*, 335 U. S. 106 (1948), the Court affirmed the dismissal of an indictment of a labor union for making an expenditure to publish in the July 4, 1947, issue of "The CIO News" an editorial specifically urging the election of a candidate for Congress. The indictment charged violation of what is now 2 U. S. C. § 44lb (and formerly 18 U. S. C. § 610), prohibiting labor unions and corporations from making contributions or expenditures in connection with federal elections. Because of the doubtful constitutionality of Act, the Court applied the rule of statutory construction requiring that statutes be construed, where possible, to avoid constitutional doubts and affirmed the dismissal of the indictment on the basis of a narrowing construction of the statute, under which the indictment failed to state an offense. The Court specifically adverted to the "gravest doubt" concerning the constitutionality which would arise if the statute were to be construed to interfere with communication between a corporation and its "customers" concerning public issues (335 U. S. at 121):

> "If [§ 44lb] were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs of periodicals *advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures* or the election to office of men, espousing such measures, the gravest doubt would arise in our minds as to its constitutionality." (Emphasis added)

The Order of the Public Service Commission in this case is a direct interference with communications between New York public utilities and their customers of the very kind condemned by implication in the Court's opinion in *C. I. O.* It is also noteworthy that in *C. I. O.* four Justices concurred in the dismissal of the indictment on the precise ground that the Act is unconstitutional.

Unquestionably, then, the Order of the Public Service Commission challenged in this case draws into play the most exacting standards of review of legislation under the First Amendment. The Order is intended to stifle and does stifle and inhibit expression on a subject matter which plays a paramount role in democratic processes—expression the Court has said lies at the core of the First Amendment's guarantee. The Order bans, on the basis of its content, the circulation of such speech through the instrumentality of the mails—historically a fundamental vehicle for the circulation of information and opinion on vital questions of public policy. The Order directly interferes with communications between corporations and their customers on public affairs—communication which the Court has stated in the strongest terms is entitled to the protection of the First Amendment.

Wholesale abolition of rights and prior restraint of such speech cannot be reconciled with the First Amendment.

C. A Prior Restraint Forbidding Written Expression on "Controversial Matters of Public Policy" Is Not Justified by Any Legitimate Governmental Interest Resting on the Assumed "Offensiveness" to Recipients of Prospective Communications.

Governmental restrictions which, on their face, restrain the exercise of the freedoms of speech, press, peti-

tion and assembly guaranteed by the First Amendment do not come before this Court with the usual presumption of constitutionality. *Thomas v. Collins,* 323 U. S. 516, 530 (1945); *Thornhill v. Alabama,* 310 U. S. 88, 95 (1940); *Schneider v. State,* 308 U. S. 147, 161 (1939). The presumption is, to the contrary, that they are unconstitutional. *United States v. C. I. O.,* 335 U. S. 106, 140 (1948) (concurring opinion of Mr. Justice Rutledge); *cf. United States v. Carolene Products Co.,* 304 U. S. 144, 155, n. 4 (1938).

Such legislation must be subjected to "critical scrutiny." *First National Bank of Boston v. Bellotti, supra,* 435 U. S. at 786-787; *Buckley v. Valeo,* 424 U. S. 1, 11 (1976). It must satisfy rigorous standards. As the Court has frequently reiterated, "[b]road prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Buckley v. Valeo, supra,* 424 U. S. at 41; *N. A. A. C. P. v. Button,* 371 U. S. 415, 438 (1963); *United States v. Robel,* 389 U. S. 258, 265 (1967).

Blanket abolition of protected speech cannot survive these tests.

The fundamental test laid down in *First National Bank of Boston v. Bellotti, supra,* is applicable here:

> "where . . . a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling,' *Bates v. Little Rock,* 361 U. S. 516, 524 (1960), see *N. A. A. C. P. v. Button,* 371 U. S. 415, 438-439 (1963); *N. A. A. C. P. v. Alabama,* 357 U. S. at 463; *Thomas v. Collins,* 323 U. S. 516, 530 (1945), 'and the burden is on the government to show the existence of such an interest.' *Elrod v. Burns,* 427 U. S. 347, 362 (1976)." *First National Bank of Boston v. Bellotti, supra,* 435 U. S. at 786.

Here the flat prohibition of the Order is plainly "directed at speech itself". The Order imposes no incidental inhibition on protected speech. The Order singles out speech addressed to public policy and absolutely bans such expression itself through the means of bill inserts sent through the mails.

Similarly, the Order singles out speech on "*controversial matters of public policy*". The term "controversial matters of public policy"—as vague and imprecise as it is—is plainly broad enough to encompass within its indiscriminate sweep speech which is "intimately related to the process of governing." It is sweeping enough to include statements by a utility concerning controversial issues such as the necessity for a national energy policy, the proper role and use of nuclear power to supply electric energy, the status of domestic and foreign fuel supplies, the effect of environmental costs on utility rates, and the wisdom of specific regulatory matters affecting pricing and the supply of fuel. The term "controversial matters of public policy" is broad enough to include remarks critical of the public behavior of the Public Service Commission and its officials and remarks critical of policies adopted by them which have a direct effect on the intended recipients of such communications, the public utility customers themselves, whether they are individuals or businesses. The Order is thus cast in language broad enough to suppress criticism of the very public officials who issued it, and it plainly prohibits speech that is "intimately related to the process of governing."

Under these circumstances, the Order may be sustained only upon showing "a subordinating interest which is compelling" and "the burden is on the government to show the existence of such an interest."

No compelling governmental interest exists to support the prohibition of the Public Service Commission's

Order. The Order is a classic prior restraint upon speech on "controversial matters of public policy," condemned by numerous decisions of this Court. *New York Times Co. v. United States,* 403 U. S. 713 (1971) (per curiam); *Organization for a Better Austin v. Keefe,* 402 U. S. 415 (1971); *Near v. Minnesota,* 283 U. S. 697 (1931). As the Court has said, any "system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United States, supra,* 403 U. S. at 714. Nor does this case present any of the "exceptional cases" which may relax the application of the doctrine condemning prior restraints. See *Near v. Minnesota, supra,* 283 U. S. at 716 (dictum).

The Order cannot survive these tests. It is said to be justified by the State's interest in protecting customers of public utilities from "offensive" messages included with their utility bills. The premise of this suggested justification is nothing but the unproved assumption that some customer might at some time disagree with some unspecified message from a utility on a "controversial matter of public policy." The Court of Appeals of New York, in its opinion below sustaining the Order said:

> "Consumers of utility services, like many others in captive situations, have no choice concerning receipt of a periodic statement from the power company. Whatever materials are enclosed in the envelope are destined to come in contact with the addressee. When the insert espouses the utility's viewpoint on a controversial question, *it is as likely to offend the sensibility of the recipient as it is to elicit agreement.* Government need not stand idly by and deny assistance to those who are inflamed by having a particular opinion foisted on them." Appendix to Jurisdictional Statement at 10a. (emphasis added)

Not only is this supposed justification of the Order not "compelling", it is wholly hypothetical. It is predicated on two unsupported assumptions. First, "unwilling recipients" of prohibited communications are assumed, and *willing* recipients are disregarded. Second, it assumes that such "unwilling recipients" would not only *disagree* with such hypothetical communications, but would find such communication on "controversial matters of public policy" to be "*offensive*". On the assumption that the hypothetical "offensiveness" of communications on "controversial" matters of public policy" rises to constitutional dimension, it was suggested that this rationale justifies the State in shielding *all* potential recipients, *in advance* and *without the consent of any* of them—including those who may agree with the communications, those who may disagree with them but not be "offended" by them, and those who may read them and be persuaded by them—from constitutionally protected speech. A clearer example of an impermissible interference by the State with the free flow of constitutionally protected speech on matters of high governing importance would be difficult to conceive.

Quite apart from the fact that it ignores the interests of utilities in participating in public debate on governmental issues, the decision of the Court of Appeals frustrates and disregards the constitutional interests of potential recipients who might be in agreement with communications from the utilities and subordinates those important interests to the interests of hypothetical recipients who might be "inflamed" or whose "sensibilities" might be "offended" by communications from public utilities on "controversial matters of public policy." The decision of the Court of Appeals also frustrates and disregards interests of constitutional dimension of those who might initially hold beliefs contrary to those espoused by

a utility but who might be persuaded by informed opinion communicated through the vehicle of bill inserts. The interests of willing recipients in receiving the materials are ignored and defeated. Finally, the decision below disregards the interest, embodied in the First Amendment in maintaining the free flow of information and opinion on public policy questions to ensure that each person may reach an informed judgment on important although "controversial" questions which might be discussed in such communications.

The constitutional deficiencies of the supposed rationale for this prior restraint are clear. As an attempted regulation by a state agency of what speech may be mailed, the Order lacks justification in any "compelling interest" of the State of New York. The power to establish and regulate the mails is a power conferred exclusively upon Congress—not the States—by Article 1 of the Constitution. Not only does the State of New York lack a "compelling interest" in this subject matter, it has no constitutionally legitimate interest in the subject matter at all, because it may not constitutionally exercise power to determine what constitutionally protected speech may be disseminated through the mails. As the Court said in *Smith v. United States*, 431 U. S. 291, 304 n. 10 (1977), adopting a nationally uniform construction of 18 U. S. C. § 1461, "[t]he regulation of the mails is a matter of particular federal concern. . . ." To the extent that the First Amendment leaves any room for the exercise of governmental power in this sphere, that power rests with Congress, not the States.

Insofar as it is suggested that this restraint may be justified as a means to protect the sensibilities of utility customers from "offensive" speech, the rationale proves both too much and too little. It proves too much because

it would justify a total ban by the Public Service Commission of all written communication by the utilities to their customers, including communications which are not sent with the utility bills. It proves too little because the Order is not limited in scope to prohibit only "offensive" communications; the Order prohibits *any* communication concerning "*controversial*" matters of public policy whether the communications are offensive or non-offensive. The Public Service Commission's Order is not genuinely concerned with the "offensive" nature of the speech of utilities or the manner of the speech. The Commission has not prohibited all "offensive" speech by utilities to their customers. The Commission has not prohibited utilities from sending "offensive" communications concerning "controversial matters of public policy" to their customers by means other than bill inserts. Nor has the Commission restricted *all* communication with utility customers by means of *bill inserts.* The Commission has only proscribed bill inserts addressed to "controversial matters of public policy." Thus, in terms of its proffered rationale, the Order is overbroad, since it is both over-inclusive and under-inclusive.

Quite apart from these deficiencies, the State's interest in prohibiting *some* speech on "controversial matters of public policy" which might be deemed to be "offensive" by *some* recipient is not a "compelling interest." It does not justify the censorship of communications to those recipients who might not find such communications "offensive". Moreover, the Court has long recognized that "a function of free speech under our system of government is to invite dispute . . . speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. Chicago*, 337 U. S. 1, 4 (1949); *Lehman v. City of Shaker Heights*, 418 U. S.

298, 319 (dissenting opinion of Mr. Justice Brennan, joined by Mr. Justice Powell, Mr. Justice Stewart, and Mr. Justice Marshall). The democratic enterprise, itself, envisions the forceful clash of ideology and opinion and the role of pungent debate in dislodging and neutralizing unexamined preconceptions and superstitions. The "offense to the sensibilities" produced by confrontation with contrary opinion on controversial matters of public policy is nothing less than the essential by-product of healthy public debate. In *Cohen v. California*, 403 U. S. 15, 24-25 (1971), the Court said: "[T]o many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength. We cannot lose sight of the fact that, in what might otherwise seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are implicated." Thus, as Mr. Justice Stevens emphasized in *FCC v. Pacifica Foundation, supra*, 438 U. S. at 745: "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." It is "firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U. S. 576, 592 (1969).

The State's asserted interest in protection of sensibilities of those hypothetical few who might be "offended"

by speech on controversial public issues is incompatible with the First Amendment and fundamentally opposed to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times v. Sullivan*, 376 U. S. 254, 270-271 (1964).

In *Erznoznik v. City of Jacksonville*, 422 U. S. 205 (1975), where the Court invalidated an ordinance making it a public nuisance and a punishable offense for a drive-in movie to exhibit films containing nudity, when the screen is visible from a public street or place, the Court elaborated on the very narrow compass of the Government's role as censor over "offensive" expression (422 U. S. at 210-211):

> ". . . [W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power."
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> * * *
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> The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.' *Rowan v. Post Office Dept., supra*, at 736. Much that we encounter offends our esthetic, if not our political and moral sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.' *Cohen v. California, supra*, at 21: see also *Spence v. Washington*, 418 U. S. 405, 412 (1974)."

As in *Erznoznik v. City of Jacksonville,* the recipient of a bill insert from a public utility retains the option to "avoid further bombardment of his sensibilities simply by averting his eyes." The recipient of a leaflet in the form of a bill insert is under no compulsion to read it and may simply discard it, thereby avoiding any offense to the sensibilities. The insubstantiality of any inconvenience cannot justify a prior restraint which, without their consent, defeats the rights of willing recipients to have the information sent to them, free from governmental intrusion and interference.

The State's asserted interest in protecting the sensibilities of a hypothetical few who might regard as "offensive" a communication from a utility company concerning a "controversial matter of public policy" clearly does not constitute a "compelling interest" justifying a prior restraint suppressing the circulation through the mails of speech on matters of public importance. For these reasons alone, the Order cannot stand.

In attempted defense of the Order it is suggested that the Order is "content-neutral" and merely regulates the "time, place and manner" of the speech, leaving open alternatives other than the inexpensive, efficient and preferred method prohibited by the Order. There is no substance to this suggestion. The Order clearly discriminates in an impermissible fashion on the basis of content against protected communications in two ways. The Order prohibits bill inserts concerning "controversial matters of public policy." Thus the Order singles out for special proscription only communications on "*public policy*", leaving unproscribed the practice of including bill inserts addressed to subjects other than "public policy" issues. In addition, the Order discriminates between "public policy" communications which are "*controversial*"

and those which are non-controversial. The Order thus segregates for special proscription non-conforming views on public policy questions, substituting for the full spectrum of opinion which emerges from "uninhibited, robust and wide-open" debate views which are in dull conformity with conventional views on public policy. The Order proscribes communication on issues which are unsettled and unresolved—precisely those issues whose intelligent and democratic resolution benefits most from free and open debate—while permitting bland communication only on public policies which are already settled by unanimous agreement.

That the Order discriminates in general fashion between "public policy" issues and other subjects makes the Order no less a content-based restriction. "That the discrimination is among entire classes of ideas rather than among points of view within a particular class, does not render it any less odious. Subject matter or content censorship in any form is forbidden." *Lehman v. City of Shaker Heights, supra,* 418 U. S. at 316 (dissenting opinion of Mr. Justice Brennan).

Moreover, "[t]hat the proscription applies to one mode of communication, therefore does not transform the Order into a 'time, place or manner' case." *Linmark Associates, Inc. v. Willingboro,* 431 U. S. 85, 94 (1977).

The Order is not content-neutral and is in fundamental conflict with the First Amendment. *Police Dept. of Chicago v. Mosley,* 408 U. S. 92 (1972); *Erznoznik v. City of Jacksonville,* 422 U. S. 205 (1975).

The fact that the Commission has left open other means by which public utilities may communicate with their customers other than through the use of bill inserts does not justify the foreclosure of this less expensive and more effective vehicle of speech. The First Amendment

protects against unauthorized encroachment by the government on the means of circulation of expression. "[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government. See e.g. *Freedman v. Maryland,* 380 U. S. 50; *Garrison v. Louisiana,* 379 U. S. 64; *Speiser v. Randall,* 357 U. S. 513." *Lamont v. Postmaster General, supra,* 381 U. S. at 309 (concurring opinion of Mr. Justice Brennan).

An Order which forecloses one avenue of expression to that extent restrains speech and communication and impairs the functioning of the system of freedom of expression protected by the First Amendment as an adjunct to democratic processes. Moreover, by closing one means of circulation of information, a restraint on expression may make practically inacessible all vehicles for dissemination of opinion and information to certain potential speakers. For these reasons, the mere existence of alternative means of dissemination of speech does not justify the closure of other means of speech. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State,* 308 U. S. 147, 163 (1939). In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* 425 U. S. at 757 n. 15, the Court said: "We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is."

While the Order does not prohibit utilities from sending communications on "controversial matters of public policy" through the mails to their customers in envelopes other than the envelopes containing utility bills, it is undisputed on this record that this alternative is prohibitively

more expensive. Insofar as the Order relegates utilities to the use of more expensive means of dissemination of constitutionally protected speech on public policy questions, solely because of the "controversial" nature of that speech, the Order infringes the First Amendment. *See, Hannegan v. Esquire,* 327 U. S. 146 (1946).

The State's asserted interest in the protection of the sensibilities of utility customers from controversial opinions on public issues is supported by neither *Rowan v. Post Office Dept.,* 397 U. S. 728 (1970) nor *Lehman v. City of Shaker Heights,* 418 U. S. 298 (1974). In *Rowan,* the Court upheld the constitutionality of a federal statute permitting a potential recipient of material bordering on the obscene to refuse delivery of the mail by notifying the post office and requesting that a directive be issued causing the removal of the recipient's name from the sender's mailing list. *Rowan* dealt with a federal restriction on delivery of mail, initiated by the recipient himself—not with intrusion by a State into this sphere without the consent of prospective recipients. Moreover, the only speech directly affected by the procedure established under the statute was unwanted mail deemed to be "erotically arousing or sexually provocative" by its prospective recipient. In sharp contrast with *Rowan,* the expression specifically proscribed by the Order at issue here lies at the core of the First Amendment's protection. In contrast with the federal statute upheld in *Rowan,* the vice of the Order involved in this case is that it does *not* leave to prospective recipients the decision whether or not to receive the communications at issue. The Order substitutes the indiscriminate hand of the State censor for the independent judgment of the prospective recipient and results in a sweeping, unjustified proscription of constitutionally protected speech. Moreover, in *Rowan* the Court carefully left open the constitutionality of one aspect of the federal statute there in

issue, 39 U. S. C. § 4009, which is analogous to the issue presented in this case. Section 4009(g) of the Act involved in *Rowan* allowed an adddresee to request the Postmaster General to include in any prohibitory order "*the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.*" In a concurring opinion, Mr. Justice Brennan noted that this provision of the law gave rise to the "possibility . . . that parents could prevent their children, even if they are 18 years old, from receiving political, religious, or other materials that the parents find offensive." With respect to this aspect of § 4009(g), which is analogous to the restraint imposed by the Order, Mr. Justice Brennan pointedly observed that the delegation of powers of censorship over the mail to parents raised significantly different problems:

> "In my view, a statute so construed and applied is not without constitutional difficulties. Cf. *Tinker v. Des Moines School Dist.*, 393 U. S. 503 (1969); *Ginsberg v. New York*, 390 U. S. 629 (1968).
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> * * *
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> In these circumstances, I understand the Court to leave open the question of the right of older children to receive materials through the mail without governmental interference and also the more specific question whether § 4009(g) may constitutionally be applied with respect to all materials and to *all* children under 19." 397 U. S. at 741.

Lehman v. City of Shaker Heights, supra, which dealt with a restriction on display advertisements in government-owned transit cars, similarly does not support the State's asserted interest in "protecting" utility customers from controversial statements of position from utilities on public policy questions. In that case, there was no Opinion of the Court. Four Justices concluded that the publicly owned and controlled areas of communication on the transit car had not been dedicated as a forum for expression which was entitled to the protection of the First Amendment and that the City's decision to limit the use of the cars was within its discretion and involved no First Amendment violation. Four Justices would have declared the regulation unconstitutional. Unlike the transit cars in *Lehman,* where no First Amendment forum was found to exist, the mails are a well-established traditional means of disseminating speech on public affairs. Moreover, the Opinion of Mr. Justice Blackmun, who was joined by Mr. Chief Justice Burger, Mr. Justice White and Mr. Justice Rehnquist, rests explicitly on the distinction between "display advertising" and other forms of less intrusive, written communication.

II. New York's Sweeping and Indefinite Ban on Written Communications by Mail Concerning "Controversial Matters of Public Policy" Is Unconstitutionally Vague and Overbroad.

Quite apart from its facial unconstitutionality under the First Amendment, the Commission's Order must be invalidated because it deprives New York's public utilities of liberty without due process of law in contravention of the Due Process Clause of the Fourteenth Amendment. The imprecise and indefinite character of the language of the command is obvious:

> "All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on *controversial matters of public policy.*" (Emphasis added).

The imprecision of the term "controversial matters of public policy" draws into play the familiar, exacting rules applicable where State regulation touches the exercise of the fundamental freedoms guaranteed by the First Amendment. Paramount among these standards is the requirement that regulation affecting the exercise of the First Amendment rights must be narrowly drawn to meet the precise evil it is intended to curb. *Cantwell v. Connecticut,* 310 U. S. 296 (1940); *Thornhill v. Alabama,* 310 U. S. 88 (1940); *Schneider v. State,* 308 U. S. 147 (1939); *DeJonge v. Oregon,* 299 U. S. 353 (1937). As the Court said in *Buckley v. Valeo, supra,* 424 U. S. at 40-41, "[C]lose examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests. See *Smith v. Goguen,* 415 U. S. 566, 573 (1974); *Cramp v. Board of Public Instruction,* 368 U. S. 278, 287-288 (1961); *Smith v. California,* 361 U. S. 147, 151 (1959). The test is whether the language of [the restriction] affords the '[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.' *NAACP v. Button,* 371 U. S. at 438."

The vices of imprecise regulation in the First Amendment area are well delineated in this Court's opinion in *Buckley v. Valeo, supra,* where the Court said (424 U. S. at 41, n. 48):

> "In such circumstances, vague laws may not only 'trap the innocent by now providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.' *Grayned v. City of Rockford,* 408 U. S. 104, 108-109 (1972), quoting *Baggett v. Bullitt,* 377 U. S. 360, 372 (1964), quoting *Speiser v. Randall,* 357 U. S. 513, 526 (1958). 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' *NAACP v. Button,* 371 U. S. at 415, 433 (1963)."

The Commission's Order exhibits all of these vices.

The Commission's Order cannot satisfy the applicable standards. In prohibiting communications with customers by the mechanism of bill inserts, the Commission's Order attempts crudely to draw a distinction between communications concerning "public policy" and communications on issues unrelated to "public policy". But, as Mr. Justice Brennan said in *Lehman v. City of Shaker Heights,* 418 U. S. 298, 319 (dissenting opinion of Mr. Justice Brennan), "[t]he line between ideological and nonideological speech is impossible to draw with accuracy." Seemingly neutral non-ideological statements may be construed to be important premises or aspects of an ideology. Moreover, the Order seeks to single out for special proscription statements of a utility's position on "controversial" matters of public policy. The term "controversial" is undefined by the Order and its connotations practically defy enumeration. What is "controversial" is a subjective matter and is inherently incapable of precise definition in advance. "[W]hat may not be provocative to one person may well be to another." *Rowan v. Post Office Dept., supra,* 397 U.S. at 728. As Mr. Justice Harlan said, in a colorful phrase in *Cohen v. California, supra*: "one man's vulgarity is another man's lyric." 403 U. S. at 25.

The term "controversial" is no less vague than the language of the statute condemned in *Coates v. City of Cincinnati,* 402 U. S. 611 (1971), which made it a criminal

offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in *a manner annoying to persons passing by* . . . ." There, the Court pointed out that "[c]onduct that annoys some people does not annoy others." 402 U. S. at 614. As the Court observed: "the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.' *Connally v. General Construction Co.*, 269 U. S. 385, 391." 402 U. S. at 614.

While the statute is also unconstitutionally overbroad, measured by the standard of the supposed interest which the Commission sought to protect—the interest in preventing "offensive" communications which might "inflame" utility customers—the inherently indefinable aim of the Commission's order is the very same as that which the Court in *Coates v. Cincinnati* condemned as unconstitutionally unspecific and indefinite.

The language of the Order immediately raises another aspect of vague regulation which is inimical to the operation of democratic processes. As a standard for the Commission's regulation of constitutionally protected speech of utilities to their customers, the Order leaves wide discretion to the Commission to determine what speech is "controversial" and what speech is not. Speech may be found to be "controversial" and therefore barred solely because the Public Service Commission of New York does not agree with it. Moreover, on this ground, as has been pointed out, a utility's criticism of the Public Service Commission's policies or regulatory measures—addressed to the utility's customers, the very class of persons who may be most affected by it and therefore possessing the most legitimate

interest in receiving such communication—may be suppressed by the commission solely because of the Commission's sensitivity to the criticism. It is clear, however, that a primary purpose of the First Amendment was to protect speech which is critical of public officials. As the Court said in *New York Times v. Sullivan, supra*:

> ". . . we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U. S. at 270.

As the Court said: "Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. * * * Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations." 376 U. S. at 272-273.

The Commission's Order is inherently antithetical to core interests protected by the First Amendment and is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.

III. Conclusion.

The Order of the Public Service Commission of the State of New York challenged in this appeal, which totally bans bill inserts by regulated privately-owned utility companies in New York expressing views on "controversial matters of public policy", is a broadside assault on the freedom of political expression guaranteed by the First Amendment. No compelling or subordinating governmental interest justifies prior restraint on written communi-

cations concerning matters of public policy which are distributed by mail. New York's direct interference with and abridgment of the right of a private corporation to communicate with its customers in this manner on public policy questions plainly violates the First Amendment.

By reason of its vague and indiscriminate sweep, the Public Service Commission's prohibition against use of bill inserts to communicate the views of public utilities on "controversial matters of public policy" deprives them of liberty without due process of law in violation of the Fourteenth Amendment.

For these reasons, Mobil respectfully submits that the Judgment of the Court of Appeals of New York should be reversed.

Respectfully submitted,

EDWIN P. ROME,
WILLIAM H. ROBERTS,
1100 Four Penn Center Plaza,
Philadelphia, Pennsylvania. 19103
Attorneys for Mobil Corporation as Amicus Curiae.

Of Counsel:

BLANK, ROME, COMISKY & MCCAULEY,
1100 Four Penn Center Plaza,
Philadelphia, Pennsylvania. 19103

F. W. D. SCHAEFER,
Mobil Corporation,
150 East 42nd Street,
New York, New York. 10017